85-644

No. _____

Supreme Court, U.S.
FILED
OCT 14 1985
JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

October Term, 1985

JOHN N. NAZARIAN,

Petitioner,

v.

MARY ANN NAZARIAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

JOHN N. NAZARIAN
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Petitioner In Propria Persona

QUESTIONS PRESENTED

I

Whether the California Court of Appeal has denied the Petitioner equal protection of the law as required by the Fourteenth Amendment to the United States Constitution, by extending extra-statutory, equitable relief to victims of judgments obtained through extrinsic fraud, while denying the same relief to victims of intrinsic fraud, such as perjury, even where the perjury has been admitted before witnesses?

II

Whether the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution require the California Court of Appeal to afford equitable relief to victims of fraudulently obtained judgments, regardless of whether the fraud is denominated intrinsic or extrinsic, so long as the traditional requirements of equity jurisdiction have been met?

CERTIFICATION AS TO INTERESTED PARTIES

The caption of this petition contains the names of all interested parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner John N. Nazarian respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Seven, entered in the above entitled case on May 17, 1985.

QUESTIONS PRESENTED

I

Whether the California Court of Appeal has denied the Petitioner equal protection of the law as required by the Fourteenth Amendment to the United States Constitution, by extending extra-statutory, equitable relief to victims of judgments obtained through extrinsic fraud, while denying the same relief to victims of intrinsic fraud, such as perjury, even where the perjury has been admitted before witnesses?

II

Whether the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution require the California Court of Appeal to afford equitable relief to victims of fraudulently obtained judgments, regardless of whether the fraud is denominated intrinsic or extrinsic, so long as the traditional requirements of equity jurisdiction have been met?

OPINION BELOW

The opinion of the Court of Appeal was not reported but appears in the appendix hereto. No opinion was rendered by the Supreme Court of the State of California. A copy of the California Supreme Court's denial of hearing is also included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeal for the State of California, Second Appellate District, Division Seven, was entered on May 17, 1985 (see, Appendix "A"). The Court of Appeal denied Mr. Nazarian's request for a rehearing on June 6, 1985 (see, Appendix "B"). A petition for hearing to the Supreme Court of the State of California was denied on July 24, 1985 (see, Appendix "C").

This court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in Section 1 that;

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 473 of the California Code of Civil Procedure (hereinafter, "C.C.P.") provides in pertinent part that:

The court may upon such terms as may be just, relieve a party or his or her legal representative from a judgment,

order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken;

Although C.C.P. Section 473 does not expressly list fraud as a ground for relief, courts apply it to judgments obtained through fraud (see, *Peterson v. Peterson,* 135 CA 2d 8, 288 P 2d 171 (1955)).

STATEMENT OF THE CASE

PRIOR ACTION

In December of 1977 interlocutory judgment of dissolution of the marriage of Mary Ann and John Nazarian was entered. The judgment included provisions dividing equally between the parties, as tenants in common, each item of real property placed in issue, with the exception of one parcel which was awarded to Mr. Nazarian as his separate property. Following denial of Mr. Nazarian's motion for a new trial, the parties cross-appealed from those portions of the judgment which had determined their property interests. On appeal the judgment was reversed for the sole purpose of making additional findings as to jewelry and a revised judgment was entered based thereon. (*In re Marriage of Nazarian,* 2 Civ. No. 56186, unpublished opinion filed Jan. 22, 1981). The Court of Appeal of the State of California for the Second Appellate District denied Mr. Nazarian's petition for a rehearing and the Supreme Court of California denied his petition for a hearing.

On October 13 of 1981, this court denied Mr. Nazarian's petition for a writ of certiorari (454 US 897 [70 L Ed 2d 212, 102 S Ct 397] Oct. 13, 1981).

CURRENT ACTION

In 1983 Mr. Nazarian, in *propria persona,* moved for an order "vacating and setting aside the judgment as to property issues" determined in the prior action, on the ground that the judgment had been obtained through extrinsic fraud. In support of his motion Mr. Nazarian submitted his declaration wherein he stated that on two occasions in 1982, Mrs. Nazarian had admitted in front of witnesses that she had given false testimony at the trial of the dissolution proceeding, concerning facts upon which the court had relied in finding that certain real property was community property of the parties.

As an exhibit to his declaration in support of the motion, Mr. Nazarian attached transcripts of audio tape recordings of Mrs. Nazarian admitting false testimony. Mrs. Nazarian opposed the motion, stating in her declaration that she was not aware of, and had not consented to the recording of her conversations with Mr. Nazarian. Furthermore, she denied that she had lied at trial.

The trial court stated in its minute order denying Mr. Nazarian's motion, "the court finds that lying at trial is not extrinsic fraud. The judgment is now final. The motion pursuant to Section 473 C.C.P. is denied without prejudice to the filing of a civil action." Mr. Nazarian appealed from that order to the Court of Appeal of the State of California for the Second Appellate district.

The Court of Appeal, in an unpublished opinion dated May 17, 1985, held that the trial court had erred in regarding Mr. Nazarian's motion as being one based

on C.C.P. Section 473, since the motion had been addressed to the court's equitable powers. Mr. Nazarian had argued that under the circumstances of his case, Mrs. Nazarian's perjury constituted extrinsic fraud for which equitable relief should be granted. Furthermore, Mr. Nazarian argued orally that the basis of the rule denying relief from a judgment obtained by intrinsic fraud is invalid. (*In re Marriage of Nazarian,* 2 Civ. No. B006807, unpublished opinion filed May 17, 1985 at p. 9).

In its opinion, the Court of Appeal stated: "California cases uniformly hold, that the introduction of perjury into a fully litigated case constitutes intrinsic fraud rather than extrinsic fraud, and therefore, [it] is not a sufficient basis for equitable relief from a final judgment." The Court of Appeal also stated that it would "not inquire as to what the law ought to be when the Supreme Court had emphatically informed [it of] what the law is." Accordingly, because the court found perjury to constitute merely intrinsic fraud, the Court of Appeal affirmed the trial court decision on May 17, 1985. Furthermore, the Court of Appeal denied Mr. Nazarian's request for a rehearing on June 5, 1985. Although Mr. Nazarian appealed to the California Supreme Court, that court denied Mr. Nazarian a hearing, on July 24, 1985.

REASONS FOR GRANTING WRIT

I

THE CONSTITUTIONAL VALIDITY OF THE RULE DENYING EQUITABLE RELIEF TO VICTIMS OF JUDGMENTS ACQUIRED THROUGH PERJURY IS RIPE FOR RECONSIDERATION BY THIS COURT AS EVIDENCE BY CRITICAL COMMENTARIES AND CONTINUING CONTROVERSY IN THE COURTS.

C.C.P. Section 473 provides a victim of a judgment obtained through either intrinsic or extrinsic fraud with a statutory remedy for six months following entry of the judgment. After the six month statute of limitations on C.C.P. Section 473 has run, the only recourse available to a victim of a judgment acquired through fraud is to seek equitable relief. Equitable relief is time barred only by the doctrine of laches.

In determining the availability of equitable relief from a fraudulently obtained judgment, California has adopted the doctrine of distinguishing between intrinsic and extrinsic frauds, as set forth by this court in *U.S. v. Throckmorton,* 98 US 61, 25 L Ed 93 (1878), (hereinafter, *"Throckmorton"*). In California, post-statutory equitable relief is available only if the fraud is extrinsic and not if the fraud is intrinsic. (*Pico v. Cohn,* 91 Cal 129, 133-134 25 P 970, 971-972, aff'd 27 P 537 (1891); *Beresh v. Sovereign Life Ins. Co.* 92 Cal App 3d 547, 155 Cal Rptr 74 (1979)). An extrinsic fraud is collateral to the proceedings, whereas an intrinsic fraud pertains to a litigated issue. Although California courts recognize that this rule causes inequitable results, (Cf., *Jorgensen v. Jorgensen,* 32 C 2d 13, 193 P 2d 728 (1948))

it is considered necessary to avoid the greater evil of potentially endless litigation (see, *Pico v. Cohn, supra*).

The *Throckmorton* doctrine has been subject to extensive criticism.[1] Many critics have suggested that the *Throckmorton* doctrine of denying equitable relief to victims of intrinsic fraud is unnecessarily harsh on these victims because the ordinary jurisdictional requirements of equity provide a satisfactory deterrent to endless litigation. In this regard, these critics have been vindicated by the experience of the State of Wisconsin. Wisconsin abolished the extrinsic-intrinsic distinction in favor of more flexible equitable principles (see, *Boring v. Ott* Wis 260, 119 NW 865 (1909); *Weber v. Weber,* 260 Wis. 420, 51 N.W. 2d 18 (1952). Because Wisconsin has not suffered endless litigation in which nothing is ever achieved (see, 36 Ill. L. Rev. 894) it is clear that the threat of endless litigation is only theoretical and not real. The Wisconsin experience proves that the fear of endless litigation is groundless, and accordingly it is clear that the *Throckmorton*

---

[1](See, Louisell and Hazard, Cases on Pleading and Procedure (3rd ed. 1973) at p. 1218; Moore, Moore's Federal Practice (2nd ed. 1948) at p. 3269; Vestal, Res Judicata/Preclusion (1969) at p. v-420; Fleming, Civil Procedure (1972) at p. 542-543; Green, Basic Civil Procedure (1972) at p. 200; Freeman, Judgments (5th ed 1925) at p. 2570; Moore and Rodgers, Federal Relief from Civil Judgments, 55 Yale L.J. 623 (1946); Aldwell, Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud, 23 Calif. L. Rev. 79 (1935); Smith, Judgments-Vacation for Fraud-Perjury, 9 N.C. L. Rev. 218 (1931); Evans, Seeking More Equitable Relief from Fraudulent Judgments; Abolishing the Extrinsic-Intrinsic Distinction, 12 Pac L. J. 1013 (1981); Injunctions Against the Enforcement of Judgments Obtained by Perjury, 22 Harv. L. Rev. 600 (1909); Fraud as a Basis for Setting Aside a Judgment, 21 Colum. L. Rev. 268 (1921); Equitable Relief Against an Award Obtained by Perjury; The Extrinsic-Intrinsic Fraud Distinction, 36 Ill. L. Rev. 894 (1942)).

doctrine produces unnecessarily harsh and inequitable results.[2]

Critics of the *Throckmorton* doctrine have also suggested that it is not clear whether *Throckmorton* is still valid law, since it conflicts in principle with the more recent case of *Marshall v. Holmes* 141 US 589, 85 L Ed 870 12 S Ct 62, (1891) (hereinafter,"*Marshall*"). Since both *Throckmorton* and *Marshall* were cited with approval by this Court in *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 US 238, 64 S Ct 997, 88 L Ed 1250 (1944), the dichotomy of these conflicting Supreme Court authorities has been accentuated, and clearly merits this Court's attention.

Furthermore, it should be noted that perhaps the most distinguished critic of the unresolved dichotomy described above is Justice Brennan who has also suggested that the continuing validity of the *Throckmorton* doctrine is unclear on behalf of the Supreme Court of New Jersey in *Shamus v. Shamus,* 9 NJ 321, 88 A2d 204 (1952).

Petitioner contends that Justice Brennan was correct in suggesting that the Court's position on the validity of the *Throckmorton* doctrine is unclear. Because this case offers the Court an opportunity to reconsider and clarify its position on the constitutional validity of denying equitable relief to victims of intrinsic frauds, Petitioner respectfully suggests that this case involves an important question of law, which is currently unresolved, and which should be decided by this court.

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[2]It should also be noted that England, Canada, Australia and New Zealand do not predicate equitable relief from a judgment acquired through fraud according to the intrinsic or extrinsic character of the fraud.

II

THE RULE DENYING EQUITABLE RELIEF TO VICTIMS OF INTRINSIC FRAUDS UNCONSTITUTIONALLY DISCRIMINATES AGAINST THOSE VICTIMS, AND BY DENYING RELIEF TO MERITORIOUS CLAIMANTS WHILE PROTECTING FRAUDULENTLY OBTAINED JUDGMENTS, THE RULE UNDERMINES PUBLIC CONFIDENCE IN THE JUDICIARY.

Petitioner contends that the rule denying equitable relief to victims of intrinsic frauds, such as perjury, unconstitutionally discriminates against them, in favor of victims of extrinsic frauds. In either case a fraud has occurred, and fraud should vitiate all proceedings where the result is based thereon, regardless of the circumstances under which is was perpetrated. Furthermore, Petitioner contends that the legal distinction between intrinsic and extrinsic frauds cannot be justified by the threat of unending litigation, since the experience of Wisconsin demonstrates that this threat is only theoretical, when jurisdictional requirements of equity are prudently maintained. Accordingly, since even a diligent victim of intrinsic fraud is as effectively denied the benefits of a meritorious claim as the victim of an extrinsic fraud, Petitioner contends the rule which arbitrarily denies relief to the former, deprives that class equal protection of the laws in an unconstitutional manner. In effect, this practice extends the benefits of CCP 473 past the statute of limitations for victims of extrinsic frauds, while denying this protection to victims of intrinsic frauds.

It has been contended that a victim of an intrinsic fraud has had his day in court and should have been

prepared to disprove an intrinsic fraud such as perjury (see, *Pico v. Cohn, supra*). Petitioner contends that it is unreasonably burdensome to expect a litigant to come to trial prepared to disprove the universe of potentially perjurious testimony. The conceivable variations of perjured testimony are countless and unpredictable. Frequently, as in this case, the means of disproving perjury does not become available until after the judgment becomes final. Surely a legally belated discovery of perjury does not render the claim any less meritorious nor does it decrease the degree of injustice caused, regardless of the nature of the fraud.

CONCLUSION

In conclusion, Petitioner respectfully suggests that there are frequently situations where both public policy and public confidence in the judiciary require the doctrine of res judicata to yield to the obvious truth. By abolishing the rule denying equitable relief to victims of intrinsic frauds as unconstitutional in favor of more flexible equitable principles, this court can restore both effectiveness and fairness to equity jurisprudence.

Respectfully submitted,

JOHN N. NAZARIAN
In Propria Persona

APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re the Marriage of MARY ANN and JOHN N. NAZARIAN.	No. B006807
	(Super.Ct.No.D-878039)
MARY ANN NAZARIAN, Plaintiff and Respondent,	COURT OF APPEAL-SECOND DIST. FILED MAY 17 1985 CLAY ROBBINS, JR. Clerk Deputy Clerk
v.	
JOHN N. NAZARIAN, Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Richard A. Lavine, Judge. Affimed.

John N. Nazarian, in pro. per., for Defendent and Appellant.

Wilson & Leeds and Robert L. Wilson for Plaintiff and Respondent.

This is an appeal from an order denying the husband's motion to vacate portions of an interlocutory judgment of dissolution of marriage.

APPENDIX A

BACKGROUND

In December 1977 interlocutory judgment of dissolution of the marriage of Mary Ann and John Nazarian was entered. The judgment included provisions dividing equally between the parties, as tenants in common, each item of real property placed in issue with the exception of one parcel which was awarded to John as his separate property. John's motion for new trial was denied. The parties cross-appealed from those portions of the judgment determining their property interests. The judgment was reversed for the sole purpose of making additional findings as to jewelry and entering a revised judgment based thereon; in all other respects the judgment was affirmed. (In re Marriage of Nazarian, 2 Civ. No. 56186, unpublished opinion filed Jan. 22, 1981.) This court denied John's petition for rehearing and the Supreme Court denied his petition for hearing: thereafter the United States Supreme Court denied his petition for writ of certiorari. (454 U.S. 897 [70 L.Ed.2d 212, 102 S.Ct. 397], Oct. 13, 1981.)

PRESENT APPEAL

In 1983 John moved for an order "vacating and setting aside judgment as to property issues" on the ground that the judgment was obtained through extrinsic fraud. In support of the motion John submitted his declaration wherein he stated that on two occasions in 1982 Mary Ann admitted to him that at the trial of the dissolution proceeding she gave false testimony concerning facts upon which the court relied in finding that certain real property was the community property of the parties. Attached to the declaration as exhibits were transcripts of tapes which John made of Mary Ann's admissions of false testimony. Mary Ann opposed the motion, stating in her declaration that she was not aware of,

and did not consent to, the recording of her conversations with John, and denying that she lied during the trial.

In its minute order denying the motion the trial court stated: "The court finds that lying at trial is not extrinsic fraud. The judgment is now final. The motion, pursuant to section 473 C.C.P., is denied without prejudice to the filing of a civil action." John appeals from that order.

An order denying a motion to vacate a judgment ordinarily is not appealable. (*County of Ventura v. Castro* (1979) 93 Cal.App.3d 462, 464, fn. 1.) An exception to this rule exists where the law makes express provision for a motion to vacate, as under Code of Civil Procedure section 473; an order denying such motion is regarded as a special order made after final judgment and hence is appealable. (*Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 282; *Martin v. Johnson* (1979) 88 Cal.App.3d 595, 604.) While the trial court apparently regarded John's motion as one based on Code of Civil Procedure section 473, the record does not support that view, for nowhere in the moving papers is section 473 cited; the motion was addressed to the equity power of the court based upon extrinsic fraud. (See *Neubrand v. Superior Court* (1970) 9 Cal.App.3d 311, 317.) A further exception to the rule of non-appealability of an order denying a motion to vacate a judgment exists "when the record available to the appellate court on such appeal raises issues which are not disclosed . . . on appeal from the judgment itself. [Citations.]" (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359.) Thus, an order denying a motion to vacate an interlocutory judgment of dissolution on the ground of extrinsic fraud is appealable where the record on an appeal from the judgment would not reflect the ground for the motion. (*Cope v. Cope* (1964) 230 Cal.App.2d 218, 229.) Inasmuch as the alleged

extrinsic fraud which was the basis of John's motion rose out of perjured testimony which he did not discover until after the judgment became final, the order denying the motion is appealable. We turn to the merits of the appeal.

A proceeding seeking relief from a judgment on the ground of extrinsic fraud is entirely independent of Code of Civil Procedure section 473. (*In re Marriage of Adkins* (1982) 137 Cal.App.3d 68, 76.) Where a judgment has been obtained through extrinsic fraud it may be set aside, though long since final, either by an independent suit in equity or, where the court that rendered the judgment possesses a general jurisdiction in law and in equity, by a motion addressed to that court. (*Neubrand v. Superior Court, supra,* 9 Cal.App.3d 311, 317-318.) Relief is available only if an otherwise valid and final judgment was obtained through extrinsic, not intrinsic, fraud. (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1068.)

In terms particularly applicable to the facts of the present case, the difference between extrinsic and intrinsic fraud and the reason for denial of relief where the fraud is intrinsic are explained in *Pico v. Cohn* (1891) 91 Cal. 129, 133-134: "That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and

when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. (*United States v. Throckmorton,* 98 U.S. 65, 66, and authorities cited.) [¶] In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation in which nothing was ever finally determined,

would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once, it could be done again and again *ad infinitum.*"

It is recognized, of course, that the terms "intrinsic" and "extrinsic" fraud "do not constitute . . . a simple and infallible formula to determine whether in a given case the facts surrounding the fraud . . . warrant equitable relief from a judgment. [Citations.] It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 19; see also *In re Marriage of Modnick* (1983) 33 Cal.3d 897, 905; *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 473.) Nevertheless, California cases uniformly hold that the introduction of perjured testimony in a fully litigated case constitutes instrinsic fraud rather than extrinsic fraud, and therefore is not a sufficient basis for equitable relief from a final judgment. (*Gale v. Witt* (1948) 31 Cal.2d 362, 366; *Hammell v. Britton* (1941) 19 Cal.2d 72, 82; *Adams v. Martin* (1935) 3 Cal.2d 246, 248-249; *Pico v. Cohn, supra,* 91 Cal. 129, 134; *Beresh v. Sovereign Life Ins. Co.* (1979) 92 Cal.App.3d 547, 554; *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 634.)

Appellant argues that the basis of the rule denying relief from a judgment obtained by intrinsic fraud is invalid, and urges that the rule not be applied in this case. Even if we agreed with appellant's argument, we would not be free to ignore the rule. Our Supreme Court

repeatedly has declared that a judgment may be set aside for fraud only if the alleged fraud is extrinsic rather than intrinsic. (See, e.g., *Kulchar v. Kulchar, supra,* 1 Cal.3d 467, 471-473; *Lopez v. Lopez* (1965) 63 Cal.2d 735, 738; *Jorgensen v. Jorgensen, supra,* 32 Cal.2d 13, 18; *Howard v. Howard* (1945) 27 Cal.2d 319, 321; *Westphal v. Westphal* (1942) 20 Cal.2d 393, 397; *Hammell v. Britton, supra,* 19 Cal.2d 72, 82; *Horton v. Horton* (1941) 18 Cal.2d 579, 584; *Caldwell v. Taylor* (1933) 218 Cal. 471, 476-477; *Pico v. Cohn, supra,* 91 Cal. 129, 133-134.) This principle has been consistently applied by the intermediate appellate courts of this state. (See, e.g., *Estate of Anderson* (1983) 149 Cal.App.3d 336, 347; *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1175-1176; *In re Marriage of Wipson* (1980) 113 Cal.App.3d 136, 141-142; *Capron v. State of California* (1966) 247 Cal.App.2d 212, 223; *Aldabe v. Aldabe* (1962) 209 Cal.App.2d 453, 474-475; *Mumma v. Mumma* (1948) 86 Cal.App.2d 133, 138; *Stiebel v. Roberts* (1941) 42 Cal.App.2d 434, 439-440.) We, likewise, are bound to follow it. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Reed v. California Coastal Zone Conservation Com.* (1975) 55 Cal.App.3d 889, 892; *Fortenberry v. Weber* (1971) 18 Cal.App.3d 213, 224; *Walker v. Capistrano Saddle Club* (1970) 12 Cal.App.3d 894, 900.) "It is not for us to inquire what the law ought to be when the Supreme Court has emphatically informed us what the law is." (*Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, 165-166.)

At the hearing on appellant's motion to vacate, he argued that the perjury, combined with the trial court's antagonism toward appellant's counsel and counsel's ineffective presentation of evidence, deprived him of his day in court and thus amounted to extrinsic fraud.

Appellant here repeats that argument; we reject it. The opinion rendered on appeal from the interlocutory judgment held that the trial court did not exhibit such bias or anger toward counsel as to have affected the court's determination of disputed issues.[1] Such holding is conclusive on the present appeal. (See *People v. Shuey* (1975) 13 Cal.3d 835, 848; *Allen v. Cal. Mutual B. & L. Assn.* (1943) 22 Cal.2d 474, 481-482; *City of Oakland v. Superior Court* (1983) 150 Cal.App.3d 267, 277; *Ryan v. Mike-Ron Corp.* (1968) 259 Cal.App.2d 91, 96.) In a civil action inadequate representation by counsel does not result in a denial of due process and does not furnish ground for reversal of a judgment entered against a client because of the failure of his attorney to exercise the requisite skill and care. (*Kim v. Orellana* (1983) 145 Cal.App.3d 1024.) It follows that inadequate representation is not a basis for the vacation of a judgment. In short, neither alone nor in combination do the asserted bias of the trial court toward appellant's counsel and counsel's ineffective presentation of evidence, convert the claimed perjury from intrinsic fraud into extrinsic fraud.

Respondent requests that we impose sanctions upon appellant for taking a frivolous appeal. (Code Civ. Proc.,

---

[1] The opinion states in pertinent part: "It is clear from the portions of the transcript cited to us by the husband that the trial court, in some instances, limited the husband's trial counsel in her efforts to continue examination or cross-examination. The husband here argues, at length, that those rulings indicated a bias by the trial court against that attorney so extreme as to have affected its determination of disputed issues. The argument is without merit. We can see in the instances cited to us no more than legitimate conduct by the trial court to keep an already lengthy trial from becoming unnecessarily longer. They in no way indicate such bias or anger toward counsel as to justify a reversal." (In re Marriage of Nazarian, 2 Civ. No. 56186, pp. 3-4; fn. omitted.)

§ 907; Cal. Rules of Court, rule 26(a).) Under the standards set forth in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648-651, it cannot be said that the appeal is frivolous.

DISPOSITION

The order is affirmed.

LILLIE, P.J.

We concur:

THOMPSON, J.

JOHNSON, J.

Los Angeles, Cal. OCT 3 - 1985, 19__

TITLE { Nazarian / Nazärian } No. B006807

The Court:

PETITION FOR REHEARING DENIED. (6-5-85)

CLAY ROBBINS, Clerk

CAM ① • OSP

APPENDIX B

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 24 1985

I have this day filed Order

REVIEW DENIED

In re: *No.* B006807

MARY ANN NAZARIAN

vs.

JOHN NAZAR NAZARIAN

Respectfully,

Clerk

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 14, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Robert L. Wilson
2040 Avenue of the Stars
Suite 400
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 14, 1985, at Los Angeles, California.

Sharon Stewart
(Original signed)

Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL, CLERK

(2)

No. 85-644

In the Supreme Court of the United States

October Term, 1985

JOHN N. NAZARIAN,

Petitioner,

v.

MARY ANN NAZARIAN,

Respondent.

BEST AVAILABLE COPY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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No. 85-644

In the Supreme Court of the United States

October Term, 1985

JOHN N. NAZARIAN,

Petitioner,

v.

MARY ANN NAZARIAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUES RAISED BY THE PETITIONER.

28 U.S.C. §1257 provides in part that:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

> 3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Rule 21.1(h) of Rules of the Supreme Court of the United States provides that:

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.
>
> Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule."

In *Webb v. Webb* (1981) 101 S.Ct. 1889; 451 U.S. 493; 68 L.Ed. 2d 392, the Court held that where Petitioner

failed to raise her federal claim in the State courts and the State Supreme Court failed to rule on a federal issue, this Court is without jurisdiction to decide the issue. Accordingly, the Court dismissed a writ of certiorari which it had previously granted.

In so holding, the Court said:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648,655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897). . . .
>
> We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162, 22 L.Ed. 2d 398 (1969): 'Although certiorari was granted to consider this question, . . . the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below.' Citing a long history of cases, we stated there that '[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions.' Ibid. We have had several occasions to repeat this rule since then, Tacon v. Arizona, 410 U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed.2d 346 (1973); Moore v. Illinois, 408 U.S. 786, 799,

92 S.Ct. 2562, 2570, 33 L.Ed.2d 706 (1972); Stanley v. Illinois, 405 U.S. 645, 658, n.10, 92 S.Ct. 1208, 1216, n.10, 31 L.Ed. 2d 551 (1972); Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); University of California Regents v. Bakke, 438 U.S. 265, 283, 98 S.Ct. 2733, 2744, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.), and we see no reason to deviate from it now.

It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, 394 U.S., at 439, 89 S.Ct., at 1163, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principal of comity requires

> 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

The principal of comity that stands behind the 'properly-raised-federal-question' doctrine is similar to the principle that stands behind the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners. We have described the latter doctrine as one based on 'federal-state comity,' Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed. 2d 438 (1971), and have described its function as reflecting

> ' 'an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights.' We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.' ' Ibid. (Citations omitted).

There are also very practical reasons for insisting that federal issues be presented

first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

For all of these reasons, we, as well as litigants seeking to bring cases here from the state courts, should take care to comply with the jurisdictional statute and our rules. Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted

> on such inflexible specificity. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here. At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court."
> 101 S.Ct.pp. 1892-1894.

Nowhere in his Petition For A Writ Of Certiorari does the Petitioner state:

(a) The stage of the proceedings, both in the court of first instance and in the appellate court at which the federal questions sought to be reviewed were raised;

(b) The method or manner of raising them; or

(c) The way they were passed upon by the court, as required by Rule 21.1(h) of this court.

The reason for Petitioner's failure to do so is obvious. He is raising the questions which he seeks this court to review for the first time in his Petition For A Writ

Of Certiorari. These questions were never presented to the California Courts by Petitioner.

Attached as Appendix "A" is a copy of the Topical Index and Table of Authorities from Petitioner's Opening Brief to the State of California, Court of Appeal, Second District.

Attached as Appendix "B" is a copy of the Topical Index and Table of Authorities from Petitioner's Reply Brief to the State of California, Court of Appeal, Second District.

Attached as Appendix "C" is a copy of the Table of Contents and Table of Authorities from Petitioner's Petition For Rehearing to the State of California, Court of Appeal, Second District.

Attached as Appendix "D" is a copy of the Topical Index and Table of Authorities from Petitioner's Petition For Hearing to the Supreme Court of the State of California.

In none of said Topical Indexes did Petitioner raise either of the two questions which he presents to this court in his Petition For A Writ Of Certiorari.

In none of said Tables of Authorities did Petitioner cite either the Fifth Amendment or the Fourteenth Amendment to the United States Constitution.

In his opening brief to the Court of Appeal of the State of California, Petitioner argued that he was denied due process in that his attorney in the original proceedings which occurred in November and December, 1976 and January and February, 1977, was ineffective; that antagonism existed between the trial judge and Petitioner's trial attorney; that the trial judge did not give due consideration to the evidence offered by Petitioner at trial; that the Court of Appeal referred

to only a few of his claimed errors and that at least eighty percent of his claims of error at trial were never accorded legitimate deliberation by any reviewing body.

His due process argument was summarized on page 15 of his opening brief to the Court of Appeal of the State of California as follows:

> "When a party is prevented from presenting the truth by an adverse party who lies, by an attorney who does not or cannot present evidence, by a trial judge who refuses to listen to the truth, by a court of appeals which does not deliberate upon claims of error, and by two Supreme Courts which will not hear the matter, it cannot be said that justice has been served just because the party had a so-called opportunity to be heard, when he in fact was not heard through no fault of his. The combined effect of the perjury and the insufficient presentation of evidence (even including appellant's testimony) by counsel (whether or not a consequence of counsel's reaction to the court's recurring criticism) is that appellant in fact did not have an opportunity to be heard. Appellant placed his cause in the hands of an attorney and a court over whom he had no control. In this case the result was the same as if appellant had not been at the trial at all."

Petitioner presented this argument in an attempt to establish that the combined effect of all of these claimed errors constituted extrinsic fraud which should result in an order vacating and setting aside the prior judgment.

The Court of Appeal responded to that argument.

However, Petitioner in the State Court proceedings did not contend that the distinction made by the courts and the legislature between extrinsic and intrinsic fraud constituted a violation of his right of due process nor that such distinction was a violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

Therefore, this Court has no jurisdiction to re-examine the judgment of the California Courts in this case.

II.

THIS CASE DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner suggests that the decision of the California Courts in the instant case was mandated by the decision of this court in *U.S. v. Throckmorton,* (1878) 98 U.S. 61, 25 L.Ed. 93.

On page 7 of his Petition For A Writ Of Certiorari, Petitioner quotes a passage from the opinion of the Court of Appeal of the State of California wherein the Court said:

> "It is not for us to inquire what the law ought to be when the Supreme Court has emphatically informed us what the law is."

Thereafter, Petitioner urges this Court should reconsider the validity of the *Throckmorton* decision because it "involves an important question of law, which is currently unresolved, and which should be decided by this court." (Petition, p.10)

The *Throckmorton, supra,* decision did not involve a constitutional issue nor an interpretation of any

provision of the Constitution of the United States and is not binding upon the State Courts as evidenced by the fact that Petitioner cites decisions of the State Courts of Wisconsin which, according to Petitioner do not follow the "*Throckmorton supra* doctrine."

The reference in the opinion of the Court of Appeal of the State of California appended to Petitioner's Petition For A Writ Of Certiorari as Appendix "A" is to the California Supreme Court—not the United States Supreme Court.

Indeed, the only reference in said opinion to any Federal decision is a single reference to the *Throckmorton, supra,* decision which is contained in a quotation taken from the California Supreme Court decision in *Pico v. Cohn* (1891) 91 Cal.129. All other references contained therein are to California statutes and to decisions of the Supreme Court and Courts of Appeal of the State of California.

It is clear from the record in this case that the decisions rendered in the State Court proceedings below were based upon the law of the State of California and not upon Federal Law.

III.

THE DISTINCTION BETWEEN INTRINSIC FRAUD AND EXTRINSIC FRAUD AS ADOPTED BY THE CALIFORNIA COURTS IN DETERMINING WHETHER A COURT OF EQUITY SHOULD SET ASIDE A FINAL JUDGMENT DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

Under the Fourteenth Amendment "due process" emphasizes fairness between the State and the individual

dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection" emphasizes disparity in treatment between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt* (1974) 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed 2d. 341.

The guarantee of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed 940.

> "Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." *United States Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 93 S.Ct. 2821, 2825, 37 L.Ed 2d 782.

The State of California certainly has a legitimate governmental interest in the finality of judgments and an end to litigation.

This interest was recognized and the reasonableness of the distinction between extrinsic and intrinsic fraud was discussed by the court in *In Re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 202 Cal.Rptr.116, wherein the court said:

> "We now summarize our view of the present state of the law by which extrinsic fraud is an equitable basis for setting aside judgments and marital settlement agreements in family law cases, considering the foregoing holdings of our Supreme Court and the statutory amendments to Civil Code sections 5125 and 5127.

General Rule

After relief is no longer available under Code of Civil Procedure section 573 for mistake, inadvertance, surprise or excusable neglect, an otherwise valid and final judgment may only be set aside if it has been obtained through extrinsic, not intrinsic, fraud.

Extrinsic Fraud

Fraud is extrinsic where the defrauded party was deprived of the opportunity to present their claim or defense to the court, that is where they were kept in ignorance or in some other manner, other than from their own conduct, fraudulently prevented from fully participating in the proceeding. If a spouse discontinues adversary proceedings because of the specific representation of the other party and his or her counsel that the spouse will not have to pursue legal remedies to obtain an equal division of the community property, and an equal division does not take place, extrinsic fraud may be found to have occurred.

Extrinsic fraud is more likely to be found to exist where a party who is not represented by counsel is persuaded to enter into an inequitable agreement by the other party and their counsel.

The following acts constitute extrinsic fraud:

Concealment by one party of the existence of a community asset, or prevention of participation in the proceeding by the other party, including a failure to disclose to the court the inability of the other party to participate.

Failure to give notice of the action to the other party, or proceeding to obtain a judgment without the knowledge of the other party, while reconciled with him or her.

Convincing the other party not to obtain counsel because the matter is not going to proceed.

Completion of the dissolution after having represented to the other party that it would not proceed without further notice.

Fairness dictates that the managing spouse has no duty to evaluate assets and may take a position favorable to himself or herself as to the character of assets, and this is done without any warranty, either as to valuation or claims of separate property character, because these are issues on which reasonable minds may differ and an inaccurate opinion or a failure to give any opinion cannot be extrinsic fraud.

Intrinsic Fraud

Any fraud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if they had the opportunity to present their case and to protect themselves from any mistake or fraud of their adversary, but unreasonably neglected to do so.

When a claim of fraud goes to an issue involving the merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent

the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate their claim, any fraud is intrinsic fraud. A mutual mistake which would be sufficient to set aside a contract is not sufficient to set aside a valid judgment incorporating a marital settlement agreement. Even though a party is mistaken as to the law and the facts, this is an insufficient basis to set aside a valid judgment incorporating a marital settlement agreement, if the party reasonably could have discovered the mistakes.

When a party was represented by counsel, absent concealment, any fraud will usually be intrinsic. After separation, each party can take a position favorable to themselves as to the character and valuation of assets, and any failure of the other party to investigate the facts constitutes intrinsic rather than extrinsic fraud.

Duty

Spouses no longer have a fiduciary duty to each other, however, they do have a duty to deal witn the other in good faith with regard to the management and control of community property. This requires the disclosure of all community assets, but not their valuation unless the valuation or facts affecting the valuation are peculiarly within the knowledge of one spouse, and reasonable inquiry and use of discovery proceedings by the other spouse would fail to disclose them. Prior to the date of separation or the filing of a petition for dissolution, whichever occurs first, there exists a confidential relationship which imposes trust

and confidence between spouses. However, upon separation or the filing of a petition for dissolution, the confidential relationship ends and the parties deal with each other at arms' length. Thereafter, as to community property, except for concealment of a community asset or nondisclosure of information as to value peculiarly within the knowledge of one spouse, each spouse may take a position favorable to themselves as to separate or community character of property and its valuation, and representations to the other in this regard are made without warranty. Once spouses negotiate at arms' length, or in an adversary manner, neither owes the duty to the other which would be owed if the parties had a confidential relationship. The duty to disclose the existence of community assets continues until there has been a division of all such assets.

Public Policy

Two conflicting public policies come into play, the policy of giving each litigant the opportunity to have their day in court, and the policy of finality of judgments and an end to litigation. The Legislature has determined that during the time frame provided by Code of Civil Procedure section 473 there is a strong public policy in favor of allowing litigants their day in court. Thus, by a lesser showing than extrinsic fraud (mistake, inadvertance, surprise, or excusable neglect) public policy favors setting aside judgments under section 473. Once relief is no longer available under section 473, the public policy in favor of finality of judgments predominates, and the power to set

aside valid final judgments and marital settlement agreements incorporated therein should be only exercised when exceptional circumstances require that the consequences of res judicata be denied. Thus, during the period when relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party their day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted."
154 Cal.App.3d at pp. 1068-1071.

CONCLUSION

Petitioner has failed to demonstrate that he was denied due process or equal protection of the laws in the trial court proceedings or the appellate proceedings and his Petition For A Writ Of Certiorari should be denied. In the alternative, the Petition For A Writ Of Certiorari should be dismissed for lack of jurisdiction.

Respondent should be awarded her costs incurred in opposing the Petition.

DATED: November ??, 1985

Respectfully submitted,

WILSON & LEEDS

By: _____

ROBERT L. WILSON

Attorney for Respondent
MARY ANN NAZARIAN

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ISSUES PRESENTED 1

1. Is the commencement of the six-month limitation of *C.C.P. section 473* tolled until discovery of the perjury which would otherwise justify relief from a judgment for intrinsic fraud?

2. Is such limitation tolled futher by the adverse party's false promise of compromise, so as to bring appellant's motion to vacate the judgment for intrinsic fraud within the time limit of *C.C.P. section 473*?

3. Is the six-month limitation of *C.C.P. sec. 473* applicable when the adverse party, subsequent to such time limit, expressly admits the perjurious conduct, so as to eliminate or at least mitigate the so-called "probability of interminable litigation?"

4. Was there a true adversary hearing at the trial when the adverse party produced evidence in petitioner's favor after testifying that she did not

have such evidence, at which time the trial judge refused to consider such evidence, saying that it no longer mattered; when there was nothing petitioner could have done to prevent the adverse party from failing to produce critical evidence on the issue of the character of marital property; when the trial judge also refused to consider the fact that the adverse party continually lied, even when that fact was demonstrated by petitioner; where petitioner was deprived of effective representation of counsel by the court's refusal to allow petitioner's counsel to present evidence regarding the nature of the marital property and by the threats and antagonistic attitude of the trial judge, compounded by time limitations and the divided attention of the trial judge resulting from a change in assignment during the trial?

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 7, 1985, I served the within *Response to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

John Nazarian, in pro per
1628 Crenshaw Boulevard
Los Angeles, California 90019

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 7, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)